SECOND CIRCUIT HOLDS STATE STANDARD DETERMINES AMENABILITY OF FOREIGN CORPORATION TO SERVICE OF PROCESS IN DIVERSITY ACTION

Arrowsmith v. United Press International
320 F.2d 219 (2d Cir. 1963)

Plaintiff, a Maryland resident, filed a complaint against United Press International, a New York corporation, in the federal district court for Vermont. Plaintiff alleged that defendant was doing business in Vermont and that diversity of citizenship existed. The theory of the action was libel, based upon a claim that UPI had dispatched a news item, under an Atlanta, Georgia dateline, which contained a defamatory reference to plaintiff as a "fat cat financier" of anti-Semitic terrorist activity. Although plaintiff alleged that the report had been transmitted to UPI's Vermont subscribers, he did not allege that he suffered damage to his reputation in Vermont, or that a Vermont publication had caused injury to his reputation in another state. The suit seems to have been brought in Vermont in order to take advantage of that state's liberal statute of limitations for defamation.[1] Defendant's Vermont activities were very restricted. UPI's only Vermont employee was a woman who maintained a desk at the State House in Montpelier. This "manager" of the Montpelier "news bureau" sent direct reports to Vermont and New Hampshire subscribers of UPI, as well as to UPI's Boston office. UPI transmitted news materials into Vermont from out-of-state offices. Service was made upon the "manager" at Montpelier. Defendant moved to dismiss upon grounds of lack of jurisdiction of defendant's person, improper venue, and that the complaint did not state a claim upon which relief could be granted. The trial court dismissed the complaint for failure to state a claim, without considering the validity of the service or venue.[2]

On appeal, the Court of Appeals for the Second Circuit, sitting *en banc*, reversed, holding that the trial court had erred in considering the sufficiency of the complaint before deciding whether the service was valid. The court decided that the trial court should use state law to determine whether defendant corporation was amenable to service in Vermont, overruling *Jaftex Corporation v. Randolph Mills, Inc.*[3] The case was remanded to the trial court.[4]

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[1] Vt. Stat. Ann, tit. 12, §512(3) (1958), discussion at note 2 of the majority opinion, Arrowsmith v. United Press Int'l, *infra* note 4 at 221.

[2] Arrowsmith v. United Press Int'l, 205 F. Supp. 56 (D. Vt. 1962).

[3] 282 F.2d 508 (2d Cir. 1960).

[4] Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963).

In *Jaftex*, the same court had decided, as an alternative ground for its holding, that federal law determined whether a foreign corporation was amenable to service in the district, in a diversity action. The lone dissenter in the instant case, Judge Clark, wrote the majority opinion in *Jaftex*. The majority in *Jaftex* concluded that the policy of providing litigants a trial according to federal standards required adoption of a federal standard for the purpose of determining whether a corporation was "present" in the district for purposes of service. Supreme Court decisions requiring federal courts to enforce state "door-closing" statutes in diversity cases[5] were considered to be inapplicable for the reason that no clear state policy would be violated by the use of a federal test in the case before the court. The *Jaftex* court also concluded that the question of whether a foreign corporation was sufficiently active in a district to make it amenable to service within the district had always been decided by federal standards.

The majority in the instant case felt that *Jaftex* was against the clear weight of authority and was leading to unfortunate results in the district courts.[6] Judge Friendly, writing for the majority, felt that state policy, as enunciated in the relevant state statutes, should not be disregarded, in the absence of a federal statute or rule to the contrary. The court found an "overwhelming consensus" to the effect that the law of the state where the court sits determines whether a foreign corporation is subject to a federal court's process under the diversity jurisdiction. The majority concluded that no federal policy required displacement of state rules in this area, finding no federal rule or statute which required the application of a federal standard.

The dissent found support in recent Supreme Court decisions for the proposition that federal courts must afford litigants a trial according to federal standards.[7] The dissent argued that there has always been a clear federal policy of protecting persons from litigation in forums which are distant from their residence. In an appendix to the dissenting opinion, most of the precedents cited in the majority opinion were distinguished on the ground that they had been decided under a different subdivision of Rule 4(d).[8] Rule 4(d)(3), involved in the instant case, simply sets forth the

[5] Angel v. Bullington, 330 U.S. 183 (1947); Woods v. Interstate Realty Co., 337 U.S. 535 (1949), holding federal law determines which issues are to be submitted to the jury in diversity actions.

[6] Note 5 of the majority opinion describes the decision in Southern New England Distrib. Corp. v. Berkeley Finance Corp., 30 F.R.D. 43 (D. Conn. 1962), in which the district court reluctantly applied the rule stated in *Jaftex*, to find that the court had jurisdiction in spite of a clear Connecticut state policy which precluded assertion of jurisdiction by a Connecticut state court. But the decision represents an improper application of *Jaftex* since the case had been removed from state court. State law determines the validity of service in a removed action, Bomze v. Nardis Sportswear, Inc., 165 F.2d 33 (2d Cir. 1948).

[7] Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958); Simler V. Conner, 372 U.S. 221 (1963).

[8] Fed. R. Civ. P. 4. Process

(d) Summons: Personal Service.

persons who may be served in order to subject corporations to the jurisdiction of a federal court. Rule 4(d)(7) provides that the mehods of service provided by state law may be used as an alternative to the method prescribed in 4(d)(3). The dissent argues that, although state law must obviously be followed under subdivision (7), it need not be under (3). The dissent would follow state law under subdivision (7), but would apply a federal standard under (3). But the majority has the better of this issue, pointing out that cases arising under both subsections involve two issues: (1) whether the proper *manner* of service was used; and (2) whether the defendant was *liable* to service at that location. Although decisions as to the manner of service under subsection (7) would not be controlling under subsection (3), it is difficult to see why the second question should not be the same under both subsections. In the majority's view of the precedents, there is authority for their position in every other circuit, except the Court of Appeals for the District of Columbia.

The duty of according federal litigants a trial by federal standards is of doubtful relevance to the question whether Arrowsmith should be given a federal forum *in Vermont.* The dissent views the instant case as being inconsistent with the use of the proposed uniform rules of evidence for the federal courts, in cases arising under the diversity of jurisdiction. But surely these questions can be decided on their own merits. The question whether a corporation should be subjected to the inconvenience of a trial in a state in which it does not have a substantial amount of business activity is a question which presents policy decisions which are very different from the policies involved in regulating the manner of trial in federal diversity actions.

The federal standard proposed by the dissent could be used to prevent various methods of state discrimination against foreign corporations which are litigants in federal courts within the state, but in view of the precedents

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. . . Service shall be made as follows:

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

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(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. (Formerly provided for service in the manner prescribed by the state in which service is made.)

and practical considerations, this policy cannot be effectively pursued. As a practical matter, it would be extremely difficult for a state to protect resident defendants against out-of-state plaintiffs, since the plaintiff could always serve the local defendant within the state. If the state discriminates against foreign corporations, as defendants, by using "long-arm" service statutes to subject such corporations to the state's jurisdiction where no reasonable basis for such jurisdiction exists, constitutional limitations will provide an effective check upon such abuse.[9] If the use of a long-arm statute in a particular case does not contravene constitutional limitations the federal courts cannot effectively prevent service by the use of a federal standard, under Rule 4(d)(3), because the plaintiff has the option of making service pursuant to 4(d)(7). Since the dissent concedes that state law controls the validity of service under 4(d)(7), it would be a simple matter to avoid a more restrictive federal standard under 4(d)(3) by service under the other subdivision.

A state rule which does not exercise the full jurisdiction available to the state constitutional limitations may well be the expression of valid state policy decisions.[10] Since the states appear to have the predominant interest in determining whether foreign corporations should be subject to service within their borders, a state rule should be used to determine the validity of service in federal diversity actions. The result in the instant case is not only in accordance with the weight of authority, but is also correct from the viewpoint of respecting state policy.

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[9] See generally, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denkla, 357 U.S. 235 (1958).

[10] The state law involved in the instant case arguably enunciates no clear state policy, but see Arrowsmith v. United Press Int'l., *supra* note 4 at 226:

> State statutes determining what foreign corporations may be sued . . . like most legislation . . . represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs while avoiding the discouragement of activity within the state by foreign corporations.